

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2015 Session

**WRIGHT BROTHERS CONSTRUCTION COMPANY, INC. v. STATE OF
TENNESSEE**

Appeal from the Tennessee Claims Commission (Middle Division)
No. K20131096 Robert N. Hibbett, Commissioner, TN Claims Commission

No. M2015-00610-COA-R9-CV – Filed December 22, 2015

Construction company bid on a state project that involved disposing of waste dirt from a construction site. Documents prepared by the Tennessee Department of Transportation (“TDOT”) identified nearby property that had a wet weather conveyance on it. The construction company made arrangements with the property owner to dump waste dirt on the neighboring property, and based on this anticipated cost, the construction company submitted a bid for the project. Before the State accepted the construction company’s bid, the wet weather conveyance was reclassified by the Tennessee Department of Environment & Conservation as a stream. This change in classification meant that the construction company was no longer able to dump waste dirt on the neighboring property. TDOT learned of the reclassification prior to accepting the construction company’s bid, and it changed the project plans after it awarded the project to the construction company. The construction company incurred unexpected costs and delays as a result of the reclassification of the wet weather conveyance, but the State refused to compensate it as the construction company asserts the contract required. The construction company filed a breach of contract complaint against the State with the Tennessee Claims Commission, which the State moved to dismiss on the basis that the Commission lacked subject matter jurisdiction to adjudicate the claim. The construction company then moved to amend its complaint to add a claim for the negligent preparation of plans. The Commission granted the State’s motion to dismiss and denied the motion to amend, and the construction company appeals. We reverse the Commission’s judgment that it lacked subject matter jurisdiction over the breach of contract claim, but we affirm its judgment denying the construction company’s motion to amend.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Claims Commission
Affirmed in Part, Reversed in Part, and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, P.J., M.S., and W. NEAL MCBRAYER, J., joined.

William J. Brown, Cleveland, Tennessee, and Martin R. Salzman, Atlanta, Georgia, for the appellant, Wright Brothers Construction Company, Inc.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Rachel Harmon, Senior Counsel, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the dismissal of a breach of contract action filed by Wright Brothers Construction Company, Inc. (“Wright Brothers”) against the State of Tennessee and a denial of Wright Brothers’ motion to amend its complaint. Wright Brothers is a construction company that submitted a bid to the State to perform a construction project that involved relocating a portion of U.S. 127 to avoid a slide area. The project was located in Fentress County, Tennessee, and required grading, drainage, and paving work. A significant amount of earth moving work was expected to generate a substantial amount of waste dirt that would have to be hauled to an appropriate waste site. According to Wright Brothers’ complaint, the bid documents included plans that detailed the surface elevations and water course designations from which Wright Brothers could determine the area where excess dirt could be placed.

Property belonging to James P. Hood was near the project site, and this property was identified on the State’s contract drawings. The State’s documents indicated there was a wet weather conveyance (“WWC”) on Mr. Hood’s property. The parties agree that this designation would not bar Wright Brothers from disposing of the waste dirt from the project site onto Mr. Hood’s property where the WWC was situated. In its initial Claim for Damages filed with the Tennessee Division of Claims Administration (“Claim for Damages”), Wright Brothers asserted that it contacted Mr. Hood and made arrangements to dump waste dirt on his property prior to determining its costs and submitting its bid for the project to the State.

Wright Brothers was awarded the contract on June 27, 2006, and the contract provided that Wright Brothers would be paid \$16,420,746.08 for completing the project. Work was supposed to begin three weeks after the contract was awarded, on July 18, 2006. The Tennessee Department of Transportation (“TDOT”) was supposed to obtain

certain environmental permits before Wright Brothers could begin work. The parties' contract provided that the necessary permits would be obtained by October 15, 2006, but TDOT did not obtain all the permits from the Tennessee Department of Environment & Conservation ("TDEC") until September 20, 2007. Much of the delay in obtaining the necessary environmental permits was caused by the reclassification of a number of water courses in the project area.

Wright Brothers asserted in its Claim for Damages that before the contract was awarded to it, TDEC notified TDOT that it was reclassifying the WWC on Mr. Hood's property, where Wright Brothers was planning to dump the waste dirt, as a stream. Wright Brothers alleged in its complaint that two days after it was awarded the contract, the project plans were revised to identify a number of new water courses in the project area and to reclassify others, including the WWC at issue on Mr. Hood's property. The effect of this reclassification was that Wright Brothers was no longer able to dump the waste dirt where it had anticipated on Mr. Hood's property. Wright Brothers was not aware of this reclassification, and TDOT did not inform Wright Brothers of the reclassification, until after TDOT accepted Wright Brothers' bid.

Wright Brothers contends that as a result of the reclassification of the WWC to a stream, it incurred unanticipated costs and delays to perform the work on the project. TDOT refused to compensate Wright Brothers for the additional expenses it incurred from obtaining alternative sites to dump the waste dirt. Wright Brothers alleges that section 104.02 of the parties' contract, entitled "Significant Changes in the Character of the Work," requires TDOT to reimburse it for the expenses it incurred as a result of the reclassification of the WWC in the amount of \$1,853,778.09.¹ Wright Brothers further

¹Section 104.02 of the parties' contract states:

1. The Engineer reserves the right to make at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project.
2. If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.
3. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

asserts that it suffered delays that would not have occurred but for the reclassification of certain water courses and that it is entitled to a time extension of at least 153 calendar days.

The State filed a motion to dismiss Wright Brothers' waste dirt claim.² The State argued that the Claims Commission lacks subject matter jurisdiction to consider the claim because it is based on the State's performance of its regulatory activities. According to the State, Wright Brothers' waste dirt claim is based on the State's regulatory activity of adding and reclassifying water courses pursuant to The Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101–69-3-148. The State relied on Tenn. Code Ann. § 9-8-307(a)(2) and § 9-8-307(a)(2)(A) of the Tennessee Claims Commission Act (the "Act") for its argument that the Commission lacks subject matter jurisdiction over any claim based upon the State's performance of its regulatory activities.³ Wright Brothers disagreed with the State's argument, stating that it was not questioning the State's performance of its regulatory activities. Rather, Wright Brothers explained, the basis for its claim is that it is entitled to rely on the information TDOT provided in preparing its bid for the construction project, and the contract documents were changed in a material manner after Wright Brothers submitted its bid. Wright Brothers relied upon the accuracy of TDOT's drawings when planning where to place its waste pit and planning the haul routes that it would need to transport the waste. When the WWC on Mr. Hood's property was reclassified as a stream, Wright Brothers claims it suffered unanticipated additional costs that it is attempting to recover from TDOT pursuant to the terms of the parties' contract.

"Engineer" refers to the Chief Engineer of TDOT or his or her duly authorized assistant or representative.

²Wright Brothers' complaint also includes a claim for damages based on excess pyrite that it was required to remove and dispose of. The State did not move to dismiss the pyrite claim, and that claim is not affected by the State's motion to dismiss Wright Brothers' waste dirt claim.

³Tennessee Code Annotated sections 9-8-307(a)(2) and 9-8-307(a)(2)(A) provide as follows:

(2) No item enumerated in this subsection (a) shall be interpreted to allow any claim against the state on account of the acts or omissions of persons, partnerships, corporations or other entities licensed or regulated by agencies of the state, notwithstanding any negligence committed by the state in the course of performing licensing or regulatory activities. No item enumerated in this subsection (a) shall be interpreted to allow any claims against the state arising out of or resulting from:

(A) The issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization, except as provided for in subdivision (a)(1)(V).

The parties held a telephonic hearing on the State's motion to dismiss on October 14, 2014, and the Commissioner entered an order granting the State's motion on November 24, 2014. The Commission reviewed section 104.02 of the parties' contract and wrote:

It is clear that the Contractor chose the John Hood property for the disposal of waste based on the State's initial classification of its waterways. Although the section is not dispositive, the Contract specifies that the Contractor is responsible for obtaining any additional permits required for off-site waste. . . . If the State had designated the John Hood property to be the waste area, then there is no doubt the Claimant could have relied on that determination in seeking reimbursement for its unexpected costs in obtaining and using an appropriate waste area. However, the Contractor chose the waste area and was responsible to obtain the permissions and permits to use the property it chose. Therefore, based on this conclusion, there is no breach of contract.

Finally, the Tribunal must conclude that there was no breach when the Claimant accepted the contract and all of the timeline revisions without demanding a re-negotiation and writing of a new contract price. The State may only be sued for breach of a *written* contract. There is nothing in the written language that could lead the Claimant to rely on the reimbursement of the unexpected costs in obtaining and using an alternate waste area. It was clearly within the discretion of the State to accept or deny these unanticipated costs. (Emphasis in original.)

Thus, the Commission determined, there was no breach of contract based on Tenn. Code Ann. § 9-8-307(a)(1)(L). Section 9-8-307(a)(1)(L) of the Act provides as follows:

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101, falling within one (1) or more of the following categories:

. . . .

(L) Actions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract

Wright Brothers filed a motion for reconsideration of the order dismissing its

waste dirt breach of contract claim and filed a subsequent motion seeking leave to amend its complaint to add a claim for negligent misrepresentation. Wright Brothers first explained that three additional sections of the parties' contract provide a basis for it to recover on its breach of contract claim: sections 104.03, 105.02, and 105.04. Section 104.03 is entitled "Extra Work," and it states:

When unforeseen work results for any reason and is not handled as prescribed elsewhere herein, the Engineer and the Contractor will attempt to agree on equitable prices. When such prices are agreed upon, a Change Order will be executed, and a Construction Change will be issued by the Engineer. When equitable prices are not agreed upon mutually, the Engineer may issue a written order that the Extra Work be completed on a force account basis and paid for as provided in Subsection 109.04.

Section 105.02 of the contract provides that "[t]he Contract Plans, generally, will show sufficient details and dimensions to define the Work." Finally, section 105.04 of the contract states that "[t]hese Specifications, any Supplemental Specifications, the Plans, Special Provisions, Earth Retaining Structures Manual and all other documents which are part of the Contract, are intended to be complementary and to describe and provide for a complete work."

In its motion to amend, Wright Brothers described how it wanted to amend its complaint. Although it described the additional claim as one for negligent misrepresentation, Wright Brothers cited Tenn. Code Ann. § 9-8-307(a)(1)(I) as the basis for its amendment. That section involves negligence in the preparation of plans rather than negligent misrepresentation per se, and during the hearing before the Commissioner on January 22, 2015, Wright Brothers explained that it sought to amend its complaint to add a claim for negligent preparation of plans rather than negligent misrepresentation.

According to the Act, the Claims Commission has jurisdiction over cases against the State based on the acts or omissions of state employees due to:

(I) Negligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways.

Tenn. Code Ann. § 9-8-307(a)(1)(I).

The Claims Commission denied Wright Brothers' motion to reconsider and its motion to amend on February 24, 2015. The Commission found it lacked subject matter jurisdiction over Wright Brothers' breach of contract claim because it was based on "the alleged negligence of the State in performing its regulatory activities." Turning to Wright Brothers' motion to amend, the Commission considered whether negligence in the preparation of plans for the construction of public roads could apply to contract actions. Concluding that the State is not obligated to issue error-free invitations to bid, the Commission denied Wright Brothers' motion to amend its complaint. The Commission concluded, "Even if Tenn. Code Ann. § 9-8-307(a)(1)(I) did apply to this action, Tenn. Code Ann. § 9-8-307(a)(2) would again prevent the claim based on the Claimant's factual allegations. The State did not have the duty to ensure the John Hood property was available for waste disposal. Therefore, the motion for leave to amend the complaint is respectfully denied."

Wright Brothers appeals from this order, arguing that (1) Tenn. Code Ann. § 9-8-307(a)(2), dealing with the acts or omissions of State agencies, does not bar Wright Brothers' waste dirt breach of contract action on jurisdictional grounds, and (2) an independent cause of action against TDOT exists pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(I) for negligence in the design and preparation of plans for the construction of a highway.

II. STANDARD OF REVIEW

The State moved to dismiss Wright Brothers' complaint for lack of subject matter jurisdiction pursuant to Tenn. R. Civ. P. 12.02(1). "Challenges to a court's subject matter jurisdiction call into question the court's 'lawful authority to adjudicate a controversy brought before it.'" *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012) (quoting *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). Subject matter jurisdiction arises from either a constitutional or legislative basis. *Schutte v. Johnson*, 337 S.W.3d 767, 769 (Tenn. Ct. App. 2010). Resolution of the question whether a tribunal has subject matter jurisdiction depends on the plaintiff's cause of action and the type of relief sought. *Id.*

A challenge to a tribunal's subject matter jurisdiction can be either a facial challenge or a factual challenge. *Redwing*, 363 S.W.3d at 445. "A facial challenge 'asserts that the complaint, considered from top to bottom, fails to allege facts that show that the court has power to hear the case,'" *Schutte*, 337 S.W.3d at 769 (quoting *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App. 2006)), even if the facts alleged are assumed to be true. *Id.* at 770. A factual challenge, by contrast, "'denies that the court actually has subject matter jurisdiction as a matter of fact even though the complaint alleges facts tending to show jurisdiction.'" *Id.* (quoting *Staats*, 206 S.W.3d at 543).

Defendants asserting a factual challenge question the facts forming the basis for the tribunal's jurisdiction, whereas defendants asserting a facial challenge argue that even if the facts alleged are true, the tribunal lacks subject matter jurisdiction. *Redwing*, 363 S.W.3d at 446; *Schutte*, 337 S.W.3d at 769-70.

The State here seems to accept the facts Wright Brothers asserts in its complaint as true for purposes of its motion to dismiss. Thus, the State's challenge to the Commission's subject matter jurisdiction is facial rather than factual, which means that the commission's decision that it lacks subject matter jurisdiction involves a question of law. We review questions of law de novo upon the record, with no presumption of correctness. TENN. R. APP. P. 13(d); *Redwing*, 363 S.W.3d at 446; *Northland Ins. Co.*, 33 S.W.3d at 729. When ruling on a motion to dismiss, the complaint is construed in a light favorable to the claimant, Wright Brothers, and the courts give the claimant the benefit of all reasonable inferences. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011); *Wells v. State*, E2004-02345-COA-R3-CV, 2005 WL 990569, at *2 (Tenn. Ct. App. Apr. 28, 2005).

III. ANALYSIS

The State of Tennessee is a sovereign entity, and it is immune from suit except to the extent that it consents to be sued. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000) (citing *Brewington v. Brewington*, 387 S.W.2d 777, 779 (Tenn. 1965)). Article 1, Section 17 of the Tennessee Constitution provides that “[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct.” According to Tenn. Code Ann. § 9-8-307(a)(1), the Claims Commission “has exclusive jurisdiction to determine all monetary claims against the state” based on the acts or omissions of state employees if the claim falls within a particular category, as set forth in the statute. *Stewart*, 33 S.W.3d at 790. Although the general rule is that statutes granting jurisdiction to hear claims against the State are to be strictly construed, the Act was amended in 1985 to provide a more liberal construction. *Id.* at 791. The Act includes the following language: “It is the intent of the general assembly that the jurisdiction of the claims Commission be liberally construed to implement the remedial purposes of this legislation.” Tenn. Code Ann. § 9-8-307(a)(3). “A policy of liberal construction of statutes . . . requires this Court to give ‘the most favorable view in support of the petitioner’s claim.’” *Stewart*, 33 S.W.3d at 791 (quoting *Brady v. Reed*, 212 S.W.2d 378, 381 (Tenn. 1948)).

A. Wright Brothers’ Contract Claim

The Claims Commission is authorized to hear and determine contract claims against the State pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L). The State contends the

Commission was correct in determining it lacked subject matter jurisdiction to hear Wright Brothers' contract claim "because [the claim] was predicated on the State's regulatory activities relating to the reclassifying of certain water courses." Wright Brothers disagrees with the State's characterization of its claim. According to Wright Brothers, TDOT breached the contract by failing to disclose material changes to the contract documents, of which it was aware, until after the contract had been bid and awarded. Wright Brothers alleges it had a right to rely on the accuracy of the plans and specifications the State provided when it was preparing its bid. Wright Brothers explains that although the addition and reclassification of certain water courses is what caused TDOT to change the contract documents, the basis for its claim is the failure by TDOT to notify Wright Brothers of the changes made by TDEC before Wright Brothers submitted its bid to TDOT or, in the alternative, to compensate it for its additional costs after the changes were made. Wright Brothers acknowledges that the addition and reclassification of water courses is a legitimate state regulatory activity, and Wright Brothers is not challenging that activity in this lawsuit.

Wright Brothers' claim is distinguishable from those of *Wells v. State*, E2004-02345-COA-R3-CV, 2005 WL 990569 (Tenn. Ct. App. Feb. 14, 2005), upon which the State relies. The plaintiffs' claims in that case were based on TDEC's regulatory activities regarding the disposal of toxic waste, *id.* at *4, whereas Wright Brothers' claims are based on TDOT's conduct that occurred as a result of TDEC's regulatory activities. Unlike the case in *Wells*, Wright Brothers does not challenge any regulatory decisions or activities.

In light of the remedial purpose of the Act and the liberal construction we are required to apply to Wright Brothers' claim for relief against the State, we conclude the Claims Commission does have subject matter jurisdiction over Wright Brothers' contract claim in this case. As Wright Brothers explains, its claim is not predicated on the State's regulatory activity, as the State contends. The regulatory activity is simply a part of the factual background of Wright Brothers' claim. Under the State's reasoning, the State is able to immunize itself from liability simply by engaging in regulatory activity before a complainant files an action against it, regardless of whether or not the regulatory activity serves as the basis for the complainant's cause of action. The State's position is not consistent with the statutory language or the intent of the legislature in enacting the Act.

The Commission's judgment granting the State's motion to dismiss Wright Brothers' breach of contract action is hereby reversed. We do not opine on the merits of Wright Brothers' claim, but we hold the Claims Commission has subject matter jurisdiction to adjudicate its waste dirt breach of contract claim.

B. Wright Brothers' Negligent Preparation of Plans Claim

Wright Brothers sought to amend its complaint to add a count for the negligent preparation of plans pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(I). Proceedings before the Claims Commission are conducted pursuant to the Tennessee Rules of Civil Procedure, except where specifically modified by the Commission. TENN. COMP. R. & REGS. 0310-01-01-.01; *Hembree v. State*, 925 S.W.2d 513, 515 (Tenn. 1996). The rules of civil procedure provide that once a responsive pleading has been served, a party may amend its pleadings by leave of court and that “leave shall be freely given when justice so requires.” TENN. R. CIV. P. 15.01. Factors a trial court should consider when faced with a motion to amend include the moving party’s undue delay in filing, bad faith, lack of notice to the other party, repeatedly failing to cure deficiencies by prior amendments, undue prejudice to the other party, and whether the amendment would be futile. *Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366, 374 (Tenn. 2007) (citing *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979)). A trial court has discretion to grant or deny a moving party’s motion to amend a pleading, but if a motion to amend is denied, the trial court is required to give a reasoned explanation for its denial. *Id.*

Discretionary decisions must take the applicable law and the relevant facts into account. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. *State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009); *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d at 358; *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005).

Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010).

In denying Wright Brothers’ motion to amend its complaint, the Commission considered whether negligence in preparing plans for the construction of public roads applied to contract actions and then answered its query by determining that the State has no obligation to issue error-free invitations to bid. The Commission did not address all the factors traditionally taken into consideration when determining whether Wright Brothers’ motion should be granted or denied, but it implicitly determined that it would

be futile to allow Wright Brothers to amend its complaint.

In its brief, the State argued that permitting Wright Brothers to amend its complaint would be futile. According to the State, “Because it would arise out of or result from TDEC’s decision to reclassify certain water courses, merely recasting the breach-of-contract claim as one alleging negligence in the preparation of the contract documents does not alter the fact that TDEC’s regulatory action is what gave rise to Wright Brothers’ claim for damages.” The State does not argue that Wright Brothers engaged in undue delay or bad faith, that the State was not notified of the proposed amendment, or that it would suffer undue prejudice as a result of the amendment.

The Claims Commission is authorized to hear and determine claims for negligence that fall within the following category:

Negligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways.

Tenn. Code Ann. § 9-8-307(a)(1)(I).

When interpreting a statute, our goal is “to give full effect to the General Assembly’s purpose, stopping just short of exceeding its intended scope.” *Lee Med.*, 312 S.W.3d at 526 (citing *Larsen-Ball v. Ball*, 301 S.W.3d 228, 232 (Tenn. 2010) and *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009)). We begin by reviewing the words used in a statute because the words reflect the legislative purpose. *Id.* (citing *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008)). “[B]ecause these words are known by the company they keep, courts must also construe these words in the context in which they appear in the statute and in light of the statute’s general purpose.” *Id.* (citing *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)) (additional citations omitted).

Several courts that have interpreted and considered the application of § 9-8-307(a)(1)(I) have determined that the beneficiaries of this section are lawful travelers along State roads who suffer damages as a result of the State’s negligence. *See, e.g., Francoeur v. State*, W2007-00853-COA-R3-CV, 2007 WL 4404105, at *10 (Tenn. Ct. App. Dec. 18, 2007); *Atkins v. State*, E2003-01255-COA-R3-CV, 2004 WL 787166, at *5 (Tenn. Ct. App. Apr. 14, 2004); *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. Ct. App. 1993). Wright Brothers relies on the case *Goodermote v. State*, 856 S.W.2d 715

(Tenn. Ct. App. 1993), in support of its argument that § 9-8-307(a)(1)(I) is meant to cover the type of negligence it alleges. The plaintiff in *Goodermote* was a passenger in an automobile who sued the State to recover damages resulting from an accident he asserted resulted from the State's negligence in the planning, design, construction, and maintenance of a State highway. *Id.* at 716-19. Finding that the statute was meant to cover the type of damages the plaintiff sought, this Court wrote:

The State has a duty to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways. *See* Tenn. Code Ann. Sec. 9-8-307(a)(1)(I). *The State owes this duty to persons lawfully traveling upon the highways of Tennessee.*

Id. at 720 (emphasis added).

This interpretation was affirmed in *Francoeur v. State*, W2007-00853-COA-R3-CV, 2007 WL 4404105 (Tenn. Ct. App. Dec. 18, 2007). The plaintiffs in that case were a motorcycle rider and his passenger who were injured when they hit a pothole on a state road. *Id.* at *1. They asserted that the State was negligent, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(I), for failing to maintain a state route highway in a safe and proper manner. *Id.* The Court of Appeals rejected the State's contention that this section of the statute was not meant to provide relief for the type of damages the plaintiffs were seeking:

It is well-settled that the State has a duty to exercise reasonable care, under all the attendant circumstances, in planning, designing, constructing, and maintaining the state system of highways, *and it owes this duty to persons lawfully traveling Tennessee highways.*

Id. at *10 (emphasis added) (citing *Goodermote*, 856 S.W.2d at 720); *see Atkins*, 2004 WL 787166, at *5 (stating that § 9-8-307(a)(1)(I) imposes duty on State towards "all persons lawfully traveling upon the highways to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways"); *Bolton v. State*, E2001-02960-COA-R9-CV, 2002 WL 1798538, at *6 (Tenn. Ct. App. Aug. 6, 2002) (stating that the duty the State owes pursuant to § 9-8-307(a)(1)(I) is to lawful travelers on state highways) (citing *Goodermote*, 856 S.W.2d at 720).

Wright Brothers cites no case, and we are aware of none, in which a court has permitted a contractor to rely on § 9-8-307(a)(1)(I) to recover damages from the State for negligently preparing plans when a traveler on a state road has not suffered some sort of

injury as a result of the road's condition. A contractor who filed suit against a governmental entity was unsuccessful in relying on this section, however, in the case *Thomas & Associates, Inc. v. Metropolitan Government of Nashville and Davidson County*, M2001-00757-COA-R3-CV, 2003 WL 21302974 (Tenn. Ct. App. June 6, 2003), and the opinion in that case is instructive. Thomas & Associates ("Thomas") was a road contractor that entered into a contract with TDOT to serve as a general contractor for the construction of road improvements on two different projects. *Id.* at *1. The projects were delayed, and Thomas asserted it incurred substantial and unanticipated costs as a result of utility relocation problems and TDOT's failure to obtain the necessary right-of-way documents. *Id.* Thomas sought to recover its financial losses and sued the Metropolitan Government of Nashville and Davidson County, asserting causes of action for breach of contract and negligence. *Id.* at *2. Thomas based its negligence claim on Tenn. Code Ann. § 9-8-307(a)(1)(I); specifically, Thomas contended that TDOT failed to use due care coordinating and relocating utilities and failing to acquire in a timely fashion all necessary right-of-way permits. *Id.* at *3-4, 6. The trial court dismissed Thomas's negligence claims, and Thomas appealed. *Id.* at *4. The Court of Appeals affirmed the dismissal of Thomas's negligence claim on the basis that TDOT did not owe Thomas the type of duty that a tortfeasor normally owes in a negligence case. *Id.* at *5-7. The *Thomas* Court first explained that the duty of care that arises in negligence cases is usually owed to individuals who are within a range of harm rather than those with whom an actor has a contractual relationship. *Id.* at *6. The Court continued that:

If a duty to conform to a standard exists between the parties irrespective of contract, and the defendant is negligent, the damaged plaintiff, generally speaking, may sue in tort. However, if the only source of duty between a particular plaintiff and defendant is their contract with each other, then a breach of that duty, without more, ordinarily will not support a negligence action.

Id. (internal citations omitted). The Court explained that a breach of contract is not tortious unless the breaching party violates a duty it owes the other party, "independent of the contract, arising from wider principles of social responsibility." *Id.* "Short of that," the *Thomas* Court wrote, "a party's breach of contract remains enforceable as a contract action – not as a tort action – regardless of whether the breach was an intentional one or an unintentional one caused by carelessness." *Id.*

The *Thomas* Court concluded that if TDOT owed a duty to Thomas, it was contractual in nature. *Id.* at *7. According to the Court,

To the extent that the Department merely breached a contractual duty toward Thomas, Thomas cannot maintain an action against the Department

for negligence. Unless Thomas can identify some other source of duty, it has no claim against the State for negligence within the exception to sovereign immunity carved out by Tenn. Code Ann. § 9-8-307(a)(1)(I).

Id.

Wright Brothers' situation is the same as Thomas's was. Wright Brothers does not contend the State owes it a duty separate and apart from the contract at issue. Without another source of duty the State owes Wright Brothers, the State is not liable to Wright Brothers under § 9-8-307(a)(1)(I) for negligence in preparing plans for the construction project.

Wright Brothers has a cause of action against the State for breach of contract pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L). We agree with the State that permitting Wright Brothers to amend its complaint to add a claim for negligent preparation of plans would be futile, but for a different reason. Wright Brothers does not fall within the group § 9-8-307(a)(1)(I) is meant to protect. *See Premium Fin. Corp. of Am., Crump Ins. Servs. of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998) (explaining that to determine whether a statutory right of action was intended by the legislature, the courts must consider whether a plaintiff "is within the protection of the statute and is an intended beneficiary"). Accordingly, we affirm the Claims Commission's decision to deny Wright Brothers' motion to amend its complaint to add a negligence claim pursuant to § 9-8-307(a)(1)(I), albeit for different reasons than those stated by the Commission.

IV. CONCLUSION

The Claims Commission's judgment is reversed in part and affirmed in part, and the case is remanded for further proceedings in accordance with this opinion. Costs of this appeal shall be taxed equally to both parties.

ANDY D. BENNETT, JUDGE